IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12681 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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PORT OFFICER

Versus

ATULBHAI PRABHULAL JANI

Appearance:

1. Special Civil Application No. 12681 of 2001

MS SEJAL K MANDAVIA for Petitioner No. 1

MR ASHISH M DAGLI for Respondent No. 1

MR DHARMENDU PANDYA for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 04/04/2002

ORAL JUDGEMENT

#. Heard Ms.Sejal K. Mandavia, learned advocate for petitioner and also Mr.A.M.Dagali, learned advocate for respondent workman on caveat.

Rule. Mr.A.M.Dagali, learned advocate waives formal service of Rule on behalf of the respondent workman.

#. The petitioner - Port Officer of Gujarat Maritime Board has challenged the award passed by the labour court, Rajkot in Reference No.273 / 1998 dated 28th March, 2001, wherein the labour court has granted reinstatement with continuity of service with 25 % backwages of the interim period. Learned advocate Ms. Mandavia on behalf of the petitioner Board has submitted that initially the respondent workman was appointed in the scale as daily rated employee for fixed period with effect from 27th August, 1996 for a period of three months. Thereafter, again he was appointed by order dated 23rd October, 1996 on the same terms. Thereafter on 19th December, 1996 for a period of six months on the same terms and again on 8th July, 1997 for period of six months on the same terms. Thereafter, on 22nd December, 1997 again for a period of three months on the same terms. Again the workman was appointed on 23rd March, 1998 for period of two months and ultimately, his services came to be terminated by order dated 20th May, 1998. Learned advocate Ms.Mandavia has submitted that services of the workman came to be terminated by the petitioner by afflux of time as periodical appointments were given to the respondent workman. Therefore, there was no need to comply the provisions of Section 25-F of the I.D.Act, 1947. However, she submits that the requirement of this Section has been fully complied with by the petitioner by paying notice pay and compensation to the respondent workman. She also submits that the respondent workman was not appointed on permanent post but he was daily rated appointed by the petitioner on periodical basis and therefore, the workman has no right to remain on the post in question and as per the terms of the contract, his services automatically terminated. Therefore, the labour court has committed error in granting reinstatement to the respondent workman with 25 % backwages. She also submits that though it is mentioned in the order of termination that his services has been terminated for the misconduct dated 20th May, 1998 but as he was not permanent employee of the Mari Time Board, there was no need to comply the principles of natural justice and to follow the regular procedure of departmental inquiry. Except the contentions referred above, no other submission is made by learned advocate Ms.Mandavia on behalf of the petitioner Board.

#. Learned advocate Mr.A.M.Dagali on behalf of the respondent workman has submitted that the respondent

workman remained in service of the petitioner Board with effect from 27th August, 1996 and he was continued in service upto 20th May, 1998. Therefore, the workman had completed 240 days continuous service though it was periodical appointments. It is further submitted that services of the workman was continuous and no break was given in between. Mr.Dagali also submitted that services of the respondent workman has not been terminated as simpliciter termination but it was based on misconduct which was mentioned in the order itself which required to follow principles of natural justice or to hold departmental inquiry before terminating the services of the respondent workman. It is further submitted that undisputedly departmental inquiry was not held and no reasonable opportunity was given to the respondent workman nor it was the case of the petitioner Board. Therefore, the labour court has rightly appreciated these aspects and granted reinstatement with 25 % backwages of the interim period. It is also submission that the labour court has committed error in not granting full backwages on the ground of presumption of gainful employment. Therefore, Mr.Dagali has submitted that any temporary employee and / or casual employee if he remained absent or any misconduct is alleged or his services terminated due to misconduct or based upon the misconduct, then such employee is entitled to reasonable opportunity according to the principles of natural justice which has not been followed in case of the respondent workman and therefore, the order of termination has been rightly set aside by the labour court. Therefore, the labour court has committed no error while passing the award and the same does not call for any interference of this Court while exercising the powers under Article 226 and 227 of the Constitution.

#. I have considered submissions of the learned advocates for the parties. The date of appointments and period of service has not been disputed between the parties. The nature of employment is also not disputed between the parties. The fact that notice pay and compensation has been paid by the petitioner to the respondent workman at the time of termination is also not disputed between the parties but the question is that his services came to be terminated by the petitioner on the basis of the misconduct as referred in the termination order dated 20th May, 1998. Therefore, in such circumstances, whether it can be said to be simple termination or by afflux of time or termination is based on misconduct attached with stigma is the question requires to be examined by this Court. This aspect has been examined by the labour court in the present matter.

Before the Labour court, statement of claim vide Exh.3 has been filed by the respondent workman and reply was filed by the petitioner vide Exh.6. Thereafter, the respondent workman has produced documentary evidence by list Exh.8 which is exhibited as Exh.9/19, whereby the respondent workman has produced various appointment orders given by the petitioner. Thereafter, the petitioner has produced documentary evidence by list Exh.21 which are exhibited as Exh.22 to 29. Thereafter, the respondent workman was examined vide Exh.30 and vide Exh.31 evidence has been closed. Thereafter, the petitioner has examined one witness Lalitbhai Chandrashankar and evidence of the petitioner was closed vide Purshis Exh.33. Thereafter, the labour court has examined the merits of the matter.

#. The labour court has considered the first aspect and come to the conclusion that considering the oral evidence of the respondent workman, he was appointed as Cardex Operator on 27th August, 1996 and his services came to be terminated on 20th May, 1998 and thus, during this period, he was continued in service as per the documentary evidence produced at Exh.9/19. Thus, all the documentary evidence have been taken into account by the labour court. The labour court has also considered the evidence of the witness of the petitioner, wherein this aspect has been in terms admitted by the witness of the petitioner. Therefore, the respondent workman had worked for more than one year and completed 240 days continuous service. Thereafter, the labour court has considered that in termination order dated 20th May, 1998, the petitioner has mentioned that his services came to be terminated because of misconduct and his service has not been terminated because of closure of department or work or any other reason and therefore, the labour court has come to the conclusion that said termination is based on misconduct. Before terminating services of the respondent workman, no notice was given to the workman calling upon explanation from him in respect of alleged misconduct. It has also come on record that no departmental inquiry was initiated against the respondent workman and no chargesheet was served but straightaway considering the misconduct, passed the termination order. The labour court has come to the conclusion while relying on cross examination of the witness of the petitioner vide Exh.32 who has admitted the fact that services of the respondent workman has been terminated because of the misconduct. It is also noticed that even in termination order, wherein also, it is clearly stated that services came to be terminated because of misconduct and secondly, it is clear admission of the witness of the petitioner

that his services was terminated because of the misconduct of the workman. Thereafter, the labour court has come to the conclusion that such termination is contrary to the principles of natural justice and violated the regular procedure and therefore, termination order is set aside. Thereafter, the labour court has examined the backwages part considering the evidence of the respondent workman and cross examination so also, presumption that during this period, the workman might not have remained unemployed and therefore, the labour court has granted 25 % backwages of the interim period.

#. I have perused the entire award under challenge. According to my opinion, the view taken by the labour court is legal and valid and the same is based on settled principles of law.

#. In identical situation in a case before the Apex Court, the Apex Court has examined this aspect in case of NARSINH PAL VS. UNION OF INDIA reported in AIR 2000 SCW 1141, the Apex Court has observed that termination of service of casual employee or laborer in the Government department worked continuously as such for more than 10 years and also required temporary status, prosecuted for criminal offence on allegation of assailing the Gateman on duty. Acquittal subsequently, the termination is based on the same incident by paying him retrenchment compensation, order based on preliminary inquiry not based on regular departmental inquiry without issuing chargesheet or giving reasonable opportunity of hearing being punitive in nature and liable to be set aside. The fact that daily wager accepted retrenchment compensation, is not of any consequences. In another decision, similar situation has been examined by the Apex Court, where the order of termination is punitive or simpliciter. This aspect has been examined by the Apex Court in case of Gujarat Steel Tubes Ltd v. Gujarat Steel Tubes Mazdoor Sabha reported in AIR 1980 SC 196. The relevant observations made in para-53 are referred as under :-

"53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If thus scrutinised the; order has a punitive flavor in

> cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. A termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination are given and noninjurious terminology is used."

#. Applying above principles laid down by the Apex Court in the Gujarat Steel Tubes case, the order in the present case cannot be considered to be a simple order of retrenchment. It was order passed by way of punishment and therefore, the order of dismissal which having been passed without holding regular departmental inquiry, cannot be sustained. Relying observations made in para-8 of NARSINH PAL case as referred above, the Apex Court has observed that "documents which have been placed before us pertaining to the preliminary inquiry may against the appellant in which statement of certain persons who had seen the incident, was recorded. Service of the appellant were thereafter terminated by paying retrenchment compensation through a cheque along with order dated 20th May, 1992. The order having been passed on the basis of the preliminary inquiry not on the basis of the regular departmental inquiry without issuing chargesheet or giving reasonable opportunity of hearing to the appellant, cannot be sustained".

#. Recently, similar view has been taken by the Allahabad High Court in case of U.P.STATE SPINNING COMPANY LTD. VS. N.K. TRIPATHI reported in 2000 [86] FLR pg.12, the Division Bench of the Allahabad High Court has observed that temporary employee, if his service has been terminated, more or less as same those of probationer. Termination of services of petitioner on the ground of inefficiency was punitive in nature, rightly set aside. Relevant observations of the Division Bench of the Allahabad High Court in abovereferred case in para-5 to 7 are reproduced below :-

"5. The principles govering termination of service of a temporay emplyee are more or less same as those of a probationer. From the decision aforesaid it is apparent that the terminationof services of the petitioner respondent on the gruond of "inefficiency" was punitive in nature and since principles of natural justice were violated, the order of termination was rightly set at naught by the learned Single Judge. Furthermore, in the counter affidavit filed in the writ petiton it has been stated that not only there were reports of "inefficieincy" against the petitioner but he was also in the "habit of going on leave without proper sanction". This is our opinion was rightly held by learned Single Judge to be tantamount to a charge of misconduct on which the services of the petitioner - respondent were not liable to be terminated without enquiry. In other words the termination of service on the ground of unauthorised absence is tantamount to termination for misconduct which could not have been done without holding proper enquiry. On the facts of this case it is established that the termination of the services of the petitioner respondent was grounded on "inefficiency" and "misconduct". In Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta and others, it has been propounded that if the findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular, departmental enquiry, the simple order of termination is to be treated as "founded", on the allegations and will be bad in law. The decision aforestated will be applicable to the facts of the present case.

6. In L.Robert D'Souza V. Executive Engineer, Sourthern Railway and another, it was held that striking off the name of the concerned employee from the rolls for unauthorised absence from duty for 8 consecutive days amounted to termination of services on the ground of misconduct and termination of service on such grounds without complying with minimum principles of natural justice would not be justified. In H.D. Singh V. Reserve bank of India and others, the Supreme Court held that striking off the name from the rolls for the reasons of unauthorised absence from duty amounted to arbitrary action.

In State Bank of India V. Workmen of State Bank of India and another, the Supreme Court considered the effect of discharge from service on similar ground on one month's notice or pay in lieu thereof and held that it was not a discharge simplicitor or a simple termination of service but one camouflaged for termination based on serious misconduct. In Mafatlal Narandas Barot Vs. J.D. Rathod, Divisional Commissioner, State Transport Mehsana and another, it has been held that,"an employer may visit the punishment of discharge or removal from service on a person who has absented himself without leave and without reasonable cause, but this cannot entail automatic removal from service without giving such person reasonable opportunity to show cause why he be not removed."

7. In D.K.Yadav V. M/s J.M.A. Industries Limited, the decisions aforestated have been relied on and it has been held that termination of services of the workman therein in terms of Clause 13[2][iv] of the Standing Orders which provided for automatic loss of lien on the post in case of expiry of eight days' absence from duty was struck down on the ground of having been passed in breach of principles of natural justice. Learned Single Judge, in our opinion, committed no error in quashing the order of termination. The appeal is, therefore, liable to be dismissed."

##. It is also necessary to consider one more aspect that provisions are made in the Industrial Disputes Act, 1947 under Section 25-F which is not licence to the employer to terminate services of any employee if they are not liked workmans' services to remain in continuous service of the employer. The said provision is not made for termination of services of the workman, if that workman is not liked by the employer. On the contrary it is safeguard provided to the employee that before terminating services, at least some procedure being condition precedent, will be followed by the employer. Merely compliance of provisions of Section 25-F of the I.D.Act, order of termination cannot be considered as legal and valid unless such termination is justified by employer and that is how, legislature has rightly enacted sub section [a] under Section 25-F which provides that workman has been given one month's notice in writing indicating reasons for retrenchment and the period of notice has expired or workman has been paid in lieu of

such wages for period of notice. Therefore, legislature wants justification by giving reasons in notice of termination. So, in absence of reason, either to justify before the authority in case of one months' pay was paid to the workman or if notice has been given, then notice must have contained reason. If reason is not given in notice then according to my opinion, in absence of reasons, even such termination though it has complied under Section 25-F of the Act, has to considered to be illegal. Therefore, every termination, if followed or complied Section 25-F of the I.D.Act, has to be justified by the employer, otherwise, such termination is illegal and invalid. Therefore, the legislature has thought it fit to incorporate sub section [a] that requires one months' notice with reasons, otherwise, notice itself is bad, contrary to the provisions of Section 25-F [a]. In case, notice pay was paid then they have to justify such termination before the labour court or any other authority when question so arises. Considering all these aspects and looking to the facts of the present case, here termination order has been passed by employer complying Section 25-F of the Act, understood that compliance is enough though termination is based on misconduct. This is clear misconception of law on the part of the petitioner and not holding departmental inquiry and not to follow regular procedure of departmental inquiry in case of misconduct before passing the order of termination, naturally contrary to the principles of natural justice. Therefore, according to my opinion, in the instant case, the labour court has rightly appreciated all these aspects and rightly come to the conclusion that order of termination is in reality dismissal which was passed without holding departmental inquiry and therefore, the labour court has rightly set aside the order and granted reinstatement with 25 % backwages of the interim period. Therefore, there is not error committed by the labour court and no jurisdictional error or no procedural irregularity committed is found apparently on the face of the record and therefore, no interference of this Court is called for while exercising the powers under Article 226 and 227 of the Constitution. Therefore, there is no substance in this petition which requires rejection at the threshold.

##. However, learned advocate Mr.Dagali for respondent workman submits that the award in question is passed by the labour court on 28th March, 2001 but till date the respondent workman has not been reinstated though this petition is filed in the year 2001. Therefore, Mr.Dagali submits that the workman remained unemployed, so also, without the benefits of Section 17-B of Act and hence,

prays for some suitable direction to be issued on the petitioner Board to comply the award in question as the same is now upheld by this Court. Considering submissions of learned advocate Mr.Dagali, it is directed to the petitioner to reinstate the workman as per the award passed by the labour court and pay 25 % backwages amount of interim period from date of termination upto date of award, within period of one month from the date of receipt of copy of this order. The petitioner Board is further directed to pay to the respondent workman the fully wages from the date of award till the date of actual reinstatement in service within period of three months from the date of receiving the copy of this order.

In view of above observations and directions, present petition stands rejected at the threshold. Accordingly, Rule stands discharged with no order as to costs. Direct Service to respondent is permitted.

Date : 4-4-2002 [H.K.Rathod, J.]

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